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HEREIN AS XPO LAST MILE, INC.)

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MAYNOR MEJIA LOPEZ, an individual;  
individually and on Behalf of All Similarly  
Situated Individuals,

Plaintiff(s),

v.

XPO LAST MILE, INC., A Georgia  
Corporation, and DOES 1 through 25,  
Inclusive,

Defendants.

Case No. 3:22-CV-08976-SI

**DEFENDANT RXO LAST MILE,  
INC.'S RESPONSE TO PLAINTIFF'S  
SUPPLEMENTAL BRIEF ON  
DEFENDANT'S MOTION TO  
COMPEL ARBITRATION**

Action Filed: 10/24/2022  
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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	LEGAL ARGUMENT .....	2
A.	Individualized Arbitration Is Not Prohibited Here.....	2
B.	Labor Code Section 229 Does Not Preclude Arbitration.....	6
C.	In Accordance with <i>Rizvanovic</i> , the Court Should Delegate Enforceability to the Arbitrator.....	7
D.	The Arbitration Agreement Is Not Unconscionable. ....	9
1.	The Arbitration Agreement Is Not Procedurally Unconscionable .....	9
2.	The Arbitration Agreement Is Not Substantively Unconscionable.....	10
i.	The Commercial Arbitration Rules Do Not Impose Excessive Fees That Are Unique to Arbitration on the Employee.....	11
ii.	The Arbitration Provision Does Not Impermissibly Waive the Right to Appeal .....	13
iii.	The Arbitration Provision Does Not Require Plaintiff to Pay Attorneys’ Fees and Costs to the Prevailing Party.....	13
iv.	The Class Action Waiver Does Not Create A Lack of Mutuality .....	14
E.	Unconscionable Provisions May be Severed So that the Contract Is Enforced .....	15
III.	CONCLUSION .....	15

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b>Page(s)</b>
<i>Armendariz v. Foundation Health Psychcare Services, Inc.</i> (2000) 24 Cal.4th 83 .....	<i>passim</i>
<i>Bravo v. RADC Enters., Inc.</i> , 33 Cal. App. 5th 920 (2019).....	6
<i>Brown v. Ralph's Grocery Co.</i> , 197 Cal. App. 4th 489 (2011).....	3
<i>Cayanan v. Citi Holdings, Inc.</i> 928 F.Supp.2d 1182 (S.D. Cal. 2013) .....	15
<i>Circuit City Stores, Inc. v. Ahmed</i> , 283 F.3d 1198 (9th Cir. 2002).....	10
<i>Cole v. Burns Intern. Sec. Servs.</i> , 105 F.3d 1465 (D.C. Cir. 1997) .....	11
<i>Conde v. Open Door Mktg.</i> , 2017 U.S. Dist. LEXIS 185508 (Nov. 8, 2017) .....	3
<i>Curry v. Equilon Enterprises, LLC</i> , 23 Cal.App.5th 289 .....	5
<i>Garrido v. Air Liquide Industrial U.S., LP</i> , 241 Cal.App.4th 833 (2015).....	5
<i>Gentry v. Super. Ct.</i> , 42 Cal. 4th 443 (2007), <i>overruled on other grounds</i> .....	1, 3, 4, 5
<i>Gilbert Street Developers, LLC v. La Quinta Homes, LLC</i> , 174 Cal.App.4th 1185 (2009).....	8
<i>Gutierrez v. Autowest, Inc.</i> , 114 Cal. App. 4th 77 (2003).....	9
<i>Henry Schein, Inc. v. Archer &amp; White Sales, Inc.</i> , 139 S.Ct. 524 (2019) .....	7
<i>Iyere v. Wise Auto Group</i> , 87 Cal.App.5th 747 (2023).....	13
<i>Kilgore v. KeyBank, N.A.</i> , 718 F.3d 1052 (9th Cir. 2013).....	10
<i>Kirby v. Immoos Fire Protection, Inc.</i> , 53 Cal.4th 1244 (2012) .....	7

1	<i>Lane v. Francis Capital Mgmt., LLC,</i>	
2	224 Cal.App.4th 676 (2014).....	7
3	<i>Little v. Auto Stiegler, Inc.,</i>	
4	29 Cal.4th 1064 (2003) .....	13
5	<i>Mohamed v. Uber Techs, Inc.,</i>	
6	848 F.3d 1201 (9th Cir. 2016).....	10
7	<i>Moncharsh v. Heilay &amp; Blase,</i>	
8	3 Cal.4th 1 (1992) .....	2
9	<i>Newton v. Am. Debt Servs.,</i>	
10	549 Fed. Appx. 692 (9th Cir. 2013).....	15
11	<i>Perry v. Thomas,</i>	
12	482 U.S. 483 (1987).....	7
13	<i>Pinnacle Museum Tower Assn. v. Pinnacle Market Dev. (US), LLC,</i>	
14	55 Cal. 4th 223 (2012) .....	9, 10
15	<i>Rent-A-Center, W., Inc. v. Jackson,</i>	
16	561 U.S. 63 (2010).....	7, 8
17	<i>Rizvanovic v. UPS, Inc.,</i>	
18	2023 U.S. Dist. LEXIS 10172 (E.D. Cal 2023) .....	1, 7
19	<i>Romero v. Watkins &amp; Shepard Trucking, Inc.,</i>	
20	2021 U.S. App. LEXIS 24804 (9th Cir. 2021).....	3, 5
21	<i>Serafin v. Balco Properties Ltd., LLC,</i>	
22	235 Cal.App.4th 165 .....	14
23	<i>Tiri v. Lucky Chances, Inc.,</i>	
24	226 Cal.App.4th 231 .....	8
25	<b><u>Statutes</u></b>	
26	California Arbitration Act.....	<i>passim</i>
27	California Civil Code section 1670.5.....	15
28	California Civil Procedure Section § 1281 .....	2
	California Labor Code §229.....	1, 6, 7, 15
	Federal Arbitration Act .....	<i>passim</i>

1     **I. INTRODUCTION**

2           At the hearing on May 3, 2023, the Court directed the parties to supplement their  
3 briefing on Defendant RXO Last Mile, Inc.’s (“Defendant” or “RXO LM”) motion to compel  
4 arbitration and address how the California Arbitration Act (“CAA”) impacts the motion to  
5 compel, in the event the Court determines the Federal Arbitration Act (“FAA”) does not apply  
6 because of the transportation worker exception. The Court suggested that the reasoning in  
7 *Rizvanovic v. UPS, Inc.*, 2023 U.S. Dist. LEXIS 10172 (E.D. Cal 2023), which addressed the  
8 enforceability of a delegation clause under the CAA, may impact whether the Court refers this  
9 case to arbitration. In the supplemental briefing, Plaintiff Maynor Mejia Lopez (“Plaintiff” or  
10 “Lopez”) asserted that arbitration is not available because, the Delivery Service Agreement  
11 (“DSA”) impermissibly requires individualized arbitration, and Labor Code §229 invalidates  
12 the Arbitration Agreement altogether. Plaintiff also took this as an opportunity to re-brief their  
13 arguments concerning unconscionability. None of these positions have merit.

14           The DSA’s arbitration provisions are not invalidated under the CAA merely because the  
15 agreement requires individual arbitration. Plaintiff, who bears the burden of establishing that  
16 the class action waiver is invalid under the *Gentry* factors, offers no evidence to demonstrate  
17 that a federal class action will more effectively address the alleged labor code violations rather  
18 than individualized arbitration of Plaintiff’s claims. The crux of Plaintiff’s claim is his  
19 relationship with RXO LM and the manner in which he was paid (by his own business). Those  
20 circumstances are highly individualized and perfectly appropriate for arbitration, irrespective of  
21 whether Plaintiff has taken it upon himself to offer his service as putative class representative  
22 for those other business owners who contracted with RXO LM and those businesses’  
23 employees. Arbitration makes sense, and the *Gentry* factors do not prevent individual  
24 arbitration. Moreover, pursuant to the reasoning in *Rizvanovic*, the Court should delegate the  
25 issues of unconscionability and enforceability of the Arbitration Agreement to the arbitrator  
26 pursuant to the DSA’s delegation provision. Plaintiff does not address the delegation clause,  
27 and instead focuses exclusively on the validity of the agreement in the first instance. In the  
28

1 event this Court finds that the class action waiver is not enforceable, however, Plaintiff's claims  
2 must be heard in Court pursuant to the express language of the delegation clause.

3 The Court should not entertain the additional briefing on unconscionability as it was not  
4 invited, and it is a second bite at the apple. The parties addressed unconscionability in the  
5 opening round of briefing, and this Court was not asking for additional briefing on this issue.  
6 For these purposes, unconscionability is a formation issue and Plaintiff should not be allowed  
7 to reargue his position on those points. That said, and because Plaintiff raises these issues  
8 again, RXO LM addresses them below. Nothing, however, has changed from the first round as  
9 there is neither procedural nor substantive unconscionability adequate to avoid the arbitration  
10 provisions in the DSA.

11 As a last point, the Court also asked RXO LM if it would agree to pay the arbitration  
12 costs, and RXO LM does agree to this, consistent with the carve out in the AAA Commercial  
13 rules for employment-related claims.

## 14 **II. LEGAL ARGUMENT**

### 15 **A. Individualized Arbitration Is Not Prohibited Here.**

16 Under California law, "a written agreement to submit to arbitration an existing  
17 controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon  
18 such grounds as exist for the revocation of any contract." C.C.P. § 1281. The CAA accords a  
19 "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of  
20 dispute resolution." *Moncharsh v. Heilay & Blase*, 3 Cal.4<sup>th</sup> 1, 9 (1992); *Armendariz v.*  
21 *Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4<sup>th</sup> 83, 94 ("California law, like  
22 federal law, favors enforcement of valid arbitration agreements.") Plaintiff asserts, however,  
23 these tenets should be cast aside because the DSA requires individual arbitration on the  
24 following terms:

25 THIS ARBITRATION AGREEMENT PROHIBITS THE ARBITRATOR FROM  
26 CONSOLIDATING THE CLAIMS OF OTHERS INTO ONE PROCEEDING. THIS  
27 MEANS AN ARBITRATOR SHALL HEAR ONLY INDIVIDUAL CLAIMS AND IS  
28 PROHIBITED FROM FASHIONING A PROCEEDING AS A CLASS OR  
COLLECTIVE ACTION OR AWARDING RELIEF IN SUCH A PROCEEDING.

1 Any question or dispute concerning the scope or validity of this paragraph shall be  
2 decided by a court of competent jurisdiction and not the arbitrator. Should a court  
3 determine that this paragraph is invalid for any reason, the parties hereby waive any  
4 right to arbitration of class or collective action and instead agree and stipulate that such  
claims will be heard only by a judge. Decl. of Benjamin Schnayerson in Support of  
Motion to Compel “Schnayerson Decl.”, Ex. 1, Section 21.6.

5 As the California Supreme Court has held, a plaintiff bears the burden of demonstrating  
6 that a class action waiver is invalid by showing a class action would be “a significantly more  
7 effective practical means of vindicating the rights of the affected employees than individual  
8 litigation or arbitration,” and the disallowance of a class action would lead to less enforcement  
9 of labor laws. *Gentry v. Super. Ct.*, 42 Cal. 4th 443, 463 (2007), *overruled on other grounds*;  
10 *see also Brown v. Ralph’s Grocery Co.*, 197 Cal. App. 4th 489, 497 (2011). When evaluating  
11 whether individual arbitration is appropriate under the CAA, the Court must consider: (1) the  
12 modest size of the potential individual recovery; (2) the potential for retaliation against  
13 members of the class; (3) the fact that absent members of the class may be ill informed about  
14 their rights; and (4) other real-world obstacles to the vindication of class members’ rights  
15 through individual arbitration. *Gentry*, 42 Cal.4<sup>th</sup> at 463.

16 A plaintiff challenging an agreement to arbitrate individually, must provide evidence for  
17 each of the *Gentry* factors, and may not rely on “conclusory or speculative statements” to  
18 invalidate a requirement to arbitrate individually. *Conde v. Open Door Mktg.*, 2017 U.S. Dist.  
19 LEXIS 185508, \*31-33 (Nov. 8, 2017) (“Plaintiffs here provide no evidence in support of their  
20 *Gentry* argument and, instead, make conclusory or speculative statements. ... generalized  
21 statements lacking supporting evidence do not satisfy the *Gentry* test”); *Romero v. Watkins &*  
22 *Shepard Trucking, Inc.*, 2021 U.S. App. LEXIS 24804, \*6 (9<sup>th</sup> Cir. 2021) (“Generalized  
23 statements from attorneys about the benefits of class wide arbitration and how the factors ought  
24 to apply cannot stand in place of an actual evidentiary showing.”) *see also Brown*, 197 Cal.  
25 App. 4th at 497. Plaintiff relies exclusively on conclusory or speculative statements and cannot  
26 therefore invalidate the requirement to arbitrate individually.

27 ///

1        *First*, Plaintiff speculates that individual recoveries will be modest for the putative class  
 2 of business owners and their workers, but this misses the point. Plaintiff formed an LLC, and  
 3 one of his claims is that he is entitled reimbursement for all of his business expenses, which is  
 4 substantial. While Plaintiff focuses on the individual wages of his workers to show that  
 5 individual recoveries will be modest, Plaintiff, and any other Contract Carrier who owns a  
 6 business and hires employees, could individually recover large amounts of business expenses,  
 7 if both employment status and business expense claims are proven. As stated in RXO LM’s  
 8 moving papers (and conceded at the hearing), Plaintiff’s company employed 10 drivers and  
 9 helpers and performed delivery services amounting to more than \$2.2 million since 2018. *See*  
 10 Declaration of Robert Hawkins in Support of Motion to Compel, ¶ 5. Plaintiff has asserted  
 11 nothing to show how modest his claims may be and cannot therefore prove this *Gentry* prong.

12        *Second*, Plaintiff only speculates that RXO LM may retaliate against class members.  
 13 The specter of retaliation is not real. Plaintiff does not assert any allegations of actual  
 14 retaliation because none has occurred, and Plaintiff’s concern for others suffering retaliation is  
 15 unwarranted. In fact, the DSA expressly states that retaliation for choosing to opt out of  
 16 arbitration – an option Plaintiff had but did not exercise – would not result in retaliation. *See*  
 17 Schnayerson Decl., Ex. 1., Section 21.10 (stating “A UNILATERAL ELECTION BY  
 18 CONTRACT CARRIER TO OPT OUT WILL NOT RESULT IN TERMINATION OF ANY  
 19 OTHER AGREEMENT BETWEEN THE PARTIES OR ANY FORM OF PENALTY,  
 20 RETALIATION OR DISADVANTAGING OF CONTRACT CARRIER BY XPO LAST  
 21 MILE.”)

22        *Third*, Plaintiff presented no evidence that the putative class of business owners and  
 23 their workers are not informed of their rights. In fact, Contract Carriers such as Plaintiff are  
 24 encouraged by the DSA to seek private counsel before accepting its terms. *Id.* at Section 21.11.  
 25 The DSA also includes an acknowledgment that the Contract Carrier “has had sufficient time  
 26 and opportunity to consult with personal, financial, tax and legal advisors prior to executing  
 27 this Agreement.” *Id.* at Section 29. If Plaintiff’s workers are uninformed, unlawfully treated,  
 28



1 under paid, then Plaintiffs' own business will be liable to them as their employer, and RXO  
2 LM's liability (if any) could arise only as a result of a finding of joint employment *See Curry v.*  
3 *Equilon Enterprises, LLC*, 23 Cal.App.5<sup>th</sup> 289, 314.

4 *Fourth*, there are no real "obstacles" for putative class members to assert their rights.  
5 Plaintiff, and other Contract Carriers, were permitted to opt out of the Arbitration Agreement,  
6 and therefore Plaintiff, and the putative class of business owners and their employees were not  
7 required to arbitrate as a condition of employment. Schnayerson Decl., Ex. 1, Section 21.10.  
8 The Arbitration Agreement provides a fair and reasonable method for any business owner to  
9 assert their rights, with a neutral arbitrator and discovery administered by a well-known and  
10 respected arbitral body. *See Romero*, 2021 U.S. App. LEXIS 24804, \*6.

11 Separately, the Arbitration Agreement itself does not impair any substantive claim, by  
12 altering the statute of limitations or limiting available remedies. *Cf. Gentry*, 42 Cal. 4th at 470.  
13 In *Gentry*, cited by Plaintiff to support his argument, the Arbitration Agreement provided for a  
14 one-year statute of limitations as opposed to the three-year statute of recovering overtime  
15 wages under C.C.P. 338. *Id.* It also limited the remedies to backpay up to one year. *Id.* Here,  
16 there is no such limitation on recovery in the Arbitration Agreement. As such, Plaintiff has not  
17 waived any of his substantive rights by agreeing to arbitration. The Arbitration Agreement  
18 simply is not unconscionable.

19 Plaintiff repeatedly cites *Garrido v. Air Liquide Industrial U.S., LP*, 241 Cal.App.4<sup>th</sup>  
20 833 (2015), to support his argument to invalidate the class action waiver, but *Garrido* is  
21 distinguishable. The plaintiff in *Garrido* was engaged individually by the defendant. Here, the  
22 Plaintiff owns a delivery company that contracts with Defendant, and hired its own workers to  
23 perform the contracted services. Additionally, in *Garrido*, the plaintiff produced evidence that  
24 his potential recovery was at most \$11,000. Plaintiff here has not put forward any evidence of  
25 his potential recovery, but it could easily exceed that amount given the number of trucks and  
26 workers Plaintiff employed while under contract with RXO LM.

27 ///

Individual arbitrations, particularly when the claimant is the owner of a company and is trying to represent his own employees, will be far more efficient and effective than a class action. Individually arbitrating Plaintiffs' claim will also avoid any conflict of interest presented by Plaintiff's relationship to his employees.

**B. Labor Code Section 229 Does Not Preclude Arbitration.**

Plaintiff argues that the language of Labor Code section 229 precludes arbitration of any claims under that statute because it provides: "Actions to enforce the provisions of article for collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitration." However, a California Court of Appeal rejected the argument in *Bravo v. RADC Enters., Inc.*, 33 Cal. App. 5th 920 (2019). *RADC* correctly contends that "[t]he text of the agreement swiftly announces its objective: the parties will arbitrate 'any and all disputes' arising from Bravo's employment, 'including any claims brought by the Employee related to wages' under the Labor Code. **The main point of the deal was to arbitrate all employment disputes.**" *Id.* at 923 (emphasis added). Therefore, notwithstanding the statutory language, claims under Labor Code section 229 must be arbitrated if the scope of an arbitration agreement includes 229 claims. *Id.* at 922-23.

Here, the Arbitration Agreement states that "any demand, assertion, or claim or cause of action for money, property, enforcement of a right, or equitable relief, including but not limited to allegations of misclassification or wage and hour violations (except as carved out below) arising out of or relating to the Agreement, shall be settled by arbitration..." Schnayerson Decl., Ex. 1, 21.1. As a result, *all* employment disputes including wage and hour matters are to be arbitrated under the Agreement.

Furthermore, Labor Code Section 229 is limited in scope and applies only in the context claims for "due and unpaid wages" that are not expressly sent to arbitration. Accordingly, it would not apply to Plaintiff's Third Cause of Action for Failure to Reimburse Business Expenses, Fifth Cause of Action for Failure to Provide Meal Periods, Sixth Cause of Action for Failure to Authorize and Permit Rest Periods, Seventh Cause of Action for Failure to Furnish

1 Accurate Wage Statements, Eighth Cause of Action for Waiting Time Penalties and Ninth  
 2 Cause of Action for Unfair Competition. Thus, should the Court find that the FAA does not  
 3 apply and that Labor Code section 229 does apply, it should still order the parties to arbitrate  
 4 the Third and Fifth through Ninth Causes of Action, and stay the class action as to the  
 5 remainder.

6 Finally, should the Court find that the FAA governs the Arbitration Agreement rather  
 7 than the CAA, Labor Code section 229 is preempted. *Perry v. Thomas*, 482 U.S. 483, 492  
 8 (1987). Even if the Court were to find that Labor Code section 229 applies and is not  
 9 preempted, Section 229 would only prohibit arbitration of some of Plaintiff's claims. *Lane v.*  
 10 *Francis Capital Mgmt., LLC*, 224 Cal.App.4<sup>th</sup> 676, 684 (2014); *Kirby v. Immoos Fire*  
 11 *Protection, Inc.*, 53 Cal.4<sup>th</sup> 1244, 1256-57 (2012) ("[A] section 226.7 claim is not an action  
 12 brought for nonpayment of wages; it is an action brought for nonprovision of meal or rest  
 13 breaks.")

14 **C. In Accordance with *Rizvanovic*, the Court Should Delegate Enforceability to**  
 15 **the Arbitrator.**

16 Plaintiff misstates the holding in *Rizvanovic v. UPS, Inc.* In *Rizvanovic*, the Court held  
 17 that there was an actual agreement, that there was a valid delegation clause, and that the issue  
 18 of arbitrability should be decided by the arbitrator, not the Court. *Id.* at 16-23. If the Court  
 19 finds that the class action waiver is enforceable, it should likewise order the Parties to  
 20 arbitration on whether the Arbitration Agreement is unconscionable.

21 "When the parties' contract delegates the arbitrability question to an arbitrator, the  
 22 courts must respect the parties' decision as embodied in the contract." *Henry Schein, Inc. v.*  
 23 *Archer & White Sales, Inc.*, 139 S.Ct. 524, 528 (2019). There are two prerequisites for a  
 24 delegation clause to be valid: (1) the language of the clause must be clear and unmistakable;  
 25 and (2) the delegation must not be revocable under state contract defenses, such as fraud,  
 26 duress, or unconscionability. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68, 69 (2010).

27 ///

1 With regards to the first factor, the Arbitration Agreement unmistakably states that the  
 2 issues of enforceability of the Arbitration Agreement is to be determined by the arbitrator and  
 3 only the enforceability of the class action waiver is to be decided by a court. *See Gilbert Street*  
 4 *Developers, LLC v. La Quinta Homes, LLC*, 174 Cal.App.4<sup>th</sup> 1185, 1192 (2009) (“just how  
 5 “clear and unmistakable” must the parties be if they choose to have an arbitrator decide his or  
 6 her own jurisdiction? An easy case is obviously when there is explicit language in the actual  
 7 signed document to that effect.”) The Agreement states in relevant part:

8  
 9 21.5 ENFORCEABILITY. Except as noted Paragraph 21.6, the arbitrator, and not any  
 10 federal, state, or local court, shall have exclusive authority to resolve any dispute  
 11 relating to the formation, enforceability, applicability, or interpretation of this  
 12 Arbitration Agreement, including without limitation any claim that this Arbitration  
 13 Agreement is void or voidable. Thus, except as noted in Paragraph 21.6, the parties  
 14 voluntarily waive the right to have a court determine the enforceability of this  
 15 Arbitration Agreement. In the event any portion of this Arbitration Agreement is  
 16 deemed unenforceable, then such portion will be modified or, if is not possible, stricken  
 17 to the extent necessary to allow enforcement of this Arbitration Agreement, and the  
 18 remaining provisions will remain in full force and effect. Schnayerson Decl., Ex. 1,  
 19 Section 21.5.

20 With regards to the second factor, a court looks at whether the delegation clause itself is  
 21 unconscionable, not the arbitration agreement as a whole. *Rent-A-Center*, 561 U.S. at 74 (the  
 22 arguments of unconscionability “must be specific to the delegation provision.”) There is  
 23 nothing unconscionable about having the arbitrator decide whether the agreement is  
 24 enforceable. As stated previously and reiterated below, the Arbitration Agreement is not  
 25 procedurally unconscionable because it has an opt-out provision, the Arbitration Agreement  
 26 language is not “hidden” in the DSA, and Plaintiff was a sophisticated party who owned his  
 27 own business when he entered into the DSA.

28 Additionally, the delegation clause is not substantively unconscionable because it is not  
 overly harsh and does not sanction one-sided results. *Tiri v. Lucky Chances, Inc.*, 226  
 Cal.App.4<sup>th</sup> 231, 246-247 (“The delegation clause here does not lack mutuality because Tiri and  
 Lucky Chances are bound by it equally.”) The delegation clause does not affect Plaintiff’s  
 ability to recover any specific remedy, it does not impose costs on the Plaintiff and neither

discovery nor the ability to litigate the merits are impacted.

**D. The Arbitration Agreement Is Not Unconscionable.**

As stated in Defendant's moving and reply papers supporting its Motion to Compel Arbitration, the Arbitration Agreement is not unconscionable.

1. The Arbitration Agreement Is Not Procedurally Unconscionable

Procedural unconscionability "addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." *Pinnacle Museum Tower Assn. v. Pinnacle Market Dev. (US), LLC*, 55 Cal. 4<sup>th</sup> 223, 246 (2012). Contrary to Plaintiff's position, there was no oppression or surprise to support procedural unconscionability. *Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4<sup>th</sup> 77, 87 (2003). The Arbitration Agreement is not a "pre-printed form buried" among other documents, as Plaintiff argues. The DSA stands alone and is not a hundred-page contract. The Arbitration Agreement appears on the twelfth page of a 15-page agreement.

The Arbitration provision of the DSA is capitalized and underlined: "ARBITRATION OF CLAIMS." Also, in bold are the terms binding the parties to arbitration: "PARTIES AGREE THAT ALL SUCH DISPUTE WILL BE RESOLVED THROUGH BINDING ARBITRATION BEFORE AN ARBITRATOR AND NOT BY WAY OF A COURT OR JURY TRIAL." Schnayerson Decl., Ex. 1, Section 21.1. The font is the same size as the rest of the document. Plaintiff is also advised to consult with an attorney on the contract terms. Schnayerson Decl., Ex. 1, 21.11. Accordingly, Plaintiff has no ability to argue that the agreement was hidden.

At the end of the DSA, Plaintiff dated and signed his name via electronic signature: Maynor Mejia Lopez, Business Owner. *Id.* at p. 15. Plaintiff used his business email address, abclogisticsllc@gmail.com, to effectuate the electronic signature. *Id.* Plaintiff, therefore, was a sophisticated party, and was aware that he was entering into a for-profit venture with Defendant.

///

1           Additionally, the Arbitration Agreement had an opt-out provision that allowed the  
 2   Plaintiff (and other drivers) to opt-out of the Arbitration Agreement, while entering into the  
 3   DSA. Schnayerson Decl., Ex. 1., Section 21.10. Plaintiff could opt-out within a 30-day period.  
 4   The provision stated that there was no retaliation or change in the terms of the agreement  
 5   between Plaintiff and Defendant if Plaintiff chose to opt out. *Id.* Courts regularly hold that if  
 6   an arbitration agreement provides an opportunity to opt out, it is not adhesive, and those who  
 7   would challenge it cannot establish procedural unconscionability. *See, e.g., Mohamed v. Uber*  
 8   *Techs, Inc.*, 848 F.3d 1201, 1211 (9<sup>th</sup> Cir. 2016); *Kilgore v. KeyBank, N.A.*, 718 F.3d 1052,  
 9   1059 (9<sup>th</sup> Cir. 2013); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9<sup>th</sup> Cir. 2002).

10           Plaintiff was not powerless when he entered into the agreement. Rather, he was the  
 11   owner of an LLC, and he had employees. The fact that Plaintiff was sophisticated enough to  
 12   employ drivers, helpers, and trucks for use in his independently run business demonstrates  
 13   Plaintiff *chose* to sign the DSA with the Arbitration Agreement.

## 14                               2. The Arbitration Agreement Is Not Substantively Unconscionable

15           Substantive unconscionability addresses the actual terms of the contract. The focus is on  
 16   whether the terms are overly harsh or so one-sided that it shocks the conscience. *Pinnacle*, 55  
 17   Cal. 4<sup>th</sup> at 246. Plaintiff cannot demonstrate *any* substantive unconscionability. In *Armendariz*  
 18   *v. Foundation Health Psych. Servs., Inc.*, 24 Cal. 4<sup>th</sup> 83 (2000), the California Supreme Court  
 19   identified six substantive conditions that *might* affect the validity of a mandatory employment  
 20   arbitration agreement. The court must determine whether the agreement (1) provides a neutral  
 21   arbitrator; (2) limits the availability of statutorily imposed remedies; (3) allows adequate  
 22   discovery; (4) provides for a written arbitration award; (5) imposes costs that are unique to  
 23   arbitration on the employee; and (6) has a “modicum of bilaterality.” *Id.* at 103-113, 117-18.

24           There is no dispute that the Arbitration Agreement provides for a neutral arbitrator, that  
 25   there is no limit on the availability of statutorily imposed remedies, that the agreement allows  
 26   for adequate discovery, that the agreement provides a written arbitration award, and that the  
 27   agreement includes a modicum of bilaterality. Instead, Plaintiff argues that the Arbitration  
 28

1 Agreement is substantively unconscionable because it imposes costs upon plaintiff, it waives  
 2 the right to appeal, and imposes an obligation on the non-prevailing party to pay the prevailing  
 3 party's attorneys' fees. Plaintiff is incorrect.

4 i. The Commercial Arbitration Rules Do Not Impose Excessive  
 5 Fees That Are Unique to Arbitration on the Employee

6 Under *Armendariz*, the California Supreme Court upheld reasonable assumption of  
 7 costs for filing fees and administrative expenses, so long as the employee is not required "to  
 8 pay arbitrators' fees ranging from \$500 to \$1,000 per day or more...in addition to  
 9 administrative and attorney's fees..." *Armendariz*, 24 Cal. 4th at 108 (citing to *Cole v. Burns*  
 10 *Intern. Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). The reasoning was the fees would be  
 11 prohibitively expensive for an employee to attempt to pursue, especially after being fired from  
 12 his position. *Id.*

13 Plaintiff argues that in a misclassification dispute, the Commercial Arbitration Rules  
 14 apply "until a determination of employment statute has been made." However, within the  
 15 Commercial Arbitration Rules, the AAA requires that the Employment Fee Schedule be  
 16 applied for a dispute between an employee or independent contractor and a business or  
 17 organization. Declaration of Michael H. Boyamian in Opposition to Motion to Compel  
 18 ("Boyamian Decl."), Ex. 4, p. 10, Footnote. Plaintiff incorrectly argues that the AAA  
 19 Commercial Rules that went into effect on September 1, 2022 do not apply because Plaintiff's  
 20 alleged employment ended before September 1, 2022. Rather, the relevant rules are the rules in  
 21 effect when the matter goes to arbitration. AAA Commercial Rule state: "These rules and any  
 22 amendment of them shall apply in the form in effect at the time the administrative filing  
 23 requirements are met for a demand for arbitration or submission agreement received by the  
 24 AAA." Boyamian Decl., Ex. 4 at p. 7. The AAA Commercial Rules also state:

25 The AAA will require any dispute regarding failure to pay wages, provide meal and rest  
 26 breaks, and all of the claims brought by Plaintiff follow AAA's Employment Rules. As  
 27 such, as discussed below, the Employment Fee Schedule still controls when it comes to  
 28 a dispute of employment matters. The AAA will apply the Employment Fee Schedule to  
 any dispute between an individual employee or an independent contractor (working or



1 performing as an individual and not incorporated) and a business or organization and  
2 the dispute involves work or work-related claims, including any statutory claims and  
3 including work-related claims under independent contractor agreements. A dispute  
4 arising out of an employment plan will be administered under the AAA's Employment  
5 Arbitration Rules and Mediation procedures. Boyamian Decl., Ex. 4 at p. 10, Footnote.

6 Furthermore, the AAA Commercial rules state that "[a]ny disputes regarding which  
7 rules should apply shall be determined by the AAA." Boyamian Decl., Ex. 4 at p. 10. Thus, as  
8 long as Plaintiff brings claims as an individual employee (which he has), the Employment Fee  
9 Schedule controls. RXO LM is prepared to pay the arbitrator's fees as with any employment  
10 arbitration. Declaration of Benjamin Schnayerson in Response to Plaintiff's Supplemental  
11 Brief ("Supp. Schnayerson Decl."), ¶ 3. In fact, the Arbitration Agreement states that  
12 Defendant would pay the arbitration costs even before the arbitrator makes any decision  
13 regarding costs:

14 If necessary for arbitration of the dispute, XPO Last Mile agrees to cover the amount of  
15 the Arbitration Costs contested by Contract Carrier until such time as the Arbitrator  
16 determines payment responsibility. Schnayerson Decl, Ex. 1, Section 21.7.

17 The Employment Fee Schedule states employees are required to only pay a non-  
18 refundable filing fee of \$350 for a single arbitrator dispute. Supp. Schnayerson Decl., Ex. B, at  
19 p. 1. In contrast, RXO LM is required to pay a fee of \$2,850 if the arbitration was filed by the  
20 individual, or \$3,200 paid in full by RXO LM if the arbitration is filed by a company. *Id.*  
21 These fees are a fraction of the cost for initiating a lawsuit in California state court.  
22 Furthermore, if the demand was filed by RXO LM (rather than Plaintiff), Plaintiff would have  
23 no costs associated with the arbitration, including the \$350 filing fee.

24 Plaintiff is subject to the Employment Fee Schedule and Employment Arbitration Rules  
25 and Mediation procedures. Plaintiff's counsel argued at the hearing that the Employment Fee  
26 Schedule does not apply to Plaintiff because he formed an LLC. This argument is flawed.  
27 First, the issue of whether Plaintiff should be treated as a business entity, employee, or  
28 independent contractor is determined by the arbitrator based on a review of the California



1 Labor Code. Second, Plaintiff argues that Plaintiff should have been treated as an employee –  
 2 rather than a corporation – because Plaintiff is alleging that he was required to bear costs and  
 3 unpaid wages as Defendant’s employee. Plaintiff cannot claim that he should be treated as an  
 4 employee and that all of the relevant case law for employment arbitrations should apply, but  
 5 that the AAA Employment rules and fee schedule do not apply, particularly when that is how  
 6 the AAA manages employment disputes. The applicable rules are based on Plaintiff’s  
 7 allegations. As a result, this dispute subject to the AAA Employment Fee Schedule and  
 8 Arbitration Rules, and Plaintiff does not pay the arbitration costs.

9 ii. The Arbitration Provision Does Not Impermissibly Waive the  
 10 Right to Appeal

11 The Arbitration Agreement does not explicitly state that there is no right to appeal the  
 12 arbitrator’s award. However, courts have held that silence on this issue of appeal does not  
 13 make an Arbitration Agreement unconscionable. *Iyere v. Wise Auto Group*, 87 Cal.App.5th 747,  
 14 761 (2023) (“If an arbitration agreement covers FEHA claims and is silent as to the minimal  
 15 elements of fairness required by *Armendariz*, courts will infer those terms.”; *Little v. Auto*  
 16 *Stiegler, Inc.*, 29 Cal.4th 1064, 1075, n.1 (2003) (agreement’s silence as to judicial review,  
 17 scope of remedies and allocation of costs did not bar enforcement as court could infer requisite  
 18 terms). In fact, the AAA Employment and Commercial rules, and the Arbitration Agreement,  
 19 allow for a court to enter judgment for any arbitration award. Schnayerson Decl., Ex. 1, Sec.  
 20 21.9; Boyamian Decl, Ex. 4 at p. 33; Supp. Schnayerson Decl., Ex. A at p. 24. The Court can  
 21 infer that the Arbitration Agreement permits judicial review to the extent permitted by law.

22 iii. The Arbitration Provision Does Not Require Plaintiff to Pay  
 23 Attorneys’ Fees and Costs to the Prevailing Party

24 While the Arbitration Agreement is silent on the issue of whether to impose an  
 25 obligation on the non-prevailing employee to pay the attorneys’ fees of the prevailing party, it  
 26 does not have to. It specifically states that the arbitrator will award any remedy available in  
 27 court:  
 28

The Arbitrator may award any party any remedy to which that party is entitled under applicable law, but such remedies will be limited to those that would be available to a party in his or her or its individual capacity in a court of law for the claims presented to and decided by the Arbitrator, and no remedies that otherwise would be available to an individual in a court of law will be forfeited by virtue of this Arbitration Agreement. Schnayerson Decl., Ex. 1, Section 21.9.

Additionally, the Employment Rules state the arbitrator can grant attorneys' fees and costs pursuant to the laws that would have been applied in court. Schnayerson Decl., Ex. 1, at p. 23. Thus, if a court would not award attorney's fees to the RXO LM as a prevailing party, neither would an arbitrator. Furthermore, as stated above, an Arbitration Agreement can be silent on specific, minimal elements of fairness and the courts can infer those terms.

iv. The Class Action Waiver Does Not Create A Lack of Mutuality

The language in the class action waiver requiring the parties to litigate in court if the class action waiver is invalidated does not render the Arbitration Agreement unconscionable, and Plaintiff has not cited any case law to that effect. Plaintiff's entire basis for the argument is that RXO LM would not bring a class action against Plaintiff and thus only Plaintiff is waiving a right. However, this language does not negate any rights of Plaintiff that he would have in court nor does it provide RXO LM with any advantages over Plaintiff. It simply states that if the class action waiver is invalidated, the parties proceed in court as Plaintiff is attempting to do in the first place. All of the cases cited by Plaintiff discuss how the employer can bring claims in Court but the employee must arbitrate their claims. *See, e.g., Serafin v. Balco Properties Ltd., LLC*, 235 Cal.App.4<sup>th</sup> 165, 182 ("Serafin contends that the language of the arbitration agreement at issue in this case is similarly one-sided and provides for arbitration of only those claims an employee is likely to pursue in court.") Conversely, here, any claim brought by the RXO LM must be in arbitration, and if the Court determines that the class action waiver is invalid, then Plaintiff would bring his class action in court.

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**E. Unconscionable Provisions May be Severed So that the Contract Is Enforced**

Even if any provision in the Agreement is determined to be unconscionable, such provision should be severed to prevent Plaintiff from gaining an undeserved benefit and RXO LM from suffering an undeserved detriment as a result of voiding the entire agreement. *Armendariz*, 24 Cal.4th at 124. California Civil Code section 1670.5 “contemplate[s] [invalidation of an entire agreement] only when an agreement is ‘permeated’ by unconscionability.” *Id.* at 122. Indeed, “[i]n California, severance is preferred over voiding the entire agreement [and t]he United States Supreme Court has an even stronger preference for severance in the context of arbitration agreements.” *Newton v. Am. Debt Servs.*, 549 Fed. Appx. 692, 695 (9th Cir. 2013) (citation and internal quotation marks omitted).

Here, severance is specifically permitted by the Arbitration Agreement. Schnayerson Decl., Ex. 1, Section 21.5. Plaintiff argued in their Supplemental Briefing that Defendant has drafted “bad faith” clauses, without naming which clauses they consider “unlawful.” Pl.’s Supp. Briefing, Dkt. 33, p. 26. Moreover, Plaintiff is unable to show that any provision of the Arbitration Agreement determined to be flawed means that the entire agreement is substantively unconscionable. *Cayanan v. Citi Holdings, Inc.* 928 F.Supp.2d 1182, 1205 (S.D. Cal. 2013) (finding that the agreement’s unfair allocation of costs and fees to the Plaintiff did not mean that the arbitration agreement was “permeated with unconscionability.”)

**III. CONCLUSION**

Even if the Court determines that the CAA applies here, as opposed to the FAA, the class action waiver is valid and enforceable. This is not a case involving an employee class representative whose individual recovery is modest. This is a case involving a business owner who could potentially recover a significant amount of money and is using the class action venue to pursue his claims. Furthermore, Labor Code section 229 would only apply to three of Plaintiff’s nine causes of action. While the Arbitration Agreement is not unconscionable, that is an issue to be delegated to the arbitrator.

1 Accordingly, Defendant respectfully requests that the Court find that the class action  
2 waiver is valid and enforce the Arbitration Agreement. However, per the DSA, if the Court  
3 invalidates the class action waiver, then the entire class action must proceed in Court.

4  
5 Dated: June 16, 2023

JACKSON LEWIS P.C.

6  
7 By: /s/Benjamin J. Schnayerson  
8 Mia Farber  
9 Benjamin J. Schnayerson  
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